SUPREME COURT, U. S.

Supreme Court, U.S.
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In The
Supreme Court of the United States

OCTOBER TERM, 1970

NO. 963

DR. ROY F. MACK,

Petitioner,

v.

THE FLORIDA STATE BOARD OF DENTISTRY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBINSON & RANDLE

EDWARD H. ROBINSON
RICHARD L. RANDLE

211 First Bank & Trust Building
Jacksonville, Florida 32202

Counsel for Respondent

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QUESTIONS PRESENTED

Respondent, The Florida State Board of Dentistry, is not satisfied with either Petitioner's statement of Questions Presented For Review or with the argumentative and factually unsupported manner in which the questions are framed and would instead prefer to state the questions presented as follows:

1. Whether a State Administrative Hearing is required to

use the "beyond a reasonable doubt" standard required only in criminal cases.

2. Whether a State Administration agency is required to function as a court, i.e., a criminal court, or may investigate, hold hearings and make decisions under the Rules of Administrative Agencies and not function as a Court.

3. Whether Federal District or Circuit Courts can institute an independent examination of a transcript when said transcript has been reviewed by the highest State Court or exercise appellate jurisdiction over State Courts.

4. Whether a Federal Court, District or Circuit, has jurisdiction upon its own independent and sua sponte examination of a transcript previously submitted to and held a valid and proper hearing by the highest State Court on the same constitutional grounds, order a rehearing or whether such Federal Court has no jurisdiction.

STATEMENT OF THE CASE

Respondent believes that a more orderly and accurate statement of the case can be presented rather than reciting part of the opinion of the United States District Court, Southern District of Florida, which was reversed by the United States Court of Appeals for the Fifth Circuit, particularly when the Federal District Court confused a State Administrative Hearing with a Criminal Court case and also wherein only favorable portions of the opinion are cited. We respectfully submit what we believe to be a more chronological and factual presentation of the statement and history of the case.

The Respondent, Florida State Board of Dentistry, is a regulatory agency established by the Legislature of the State

of Florida (Chapter 466 of the Florida Statutes) for the purpose inter alia of conducting hearings on proceedings to revoke or suspend a license when evidence has been presented showing violations of the aforesaid statute.

The Petitioner, Dr. Roy F. Mack, was a licensed dentist authorized to practice dentistry in the State of Florida prior to the revocation of his license by the defendant Board effective on April 1st, 1966.

Dr. Roy F. Mack's license to practice dentistry had been suspended on a previous occasion in 1962.

In 1966, Dr. Mack in accordance with the Florida Statutes was charged with a violation of the Florida Statutes pertaining to the practice of dentistry and an Administrative Hearing was had on February 18, 1966, having been continued from January 7, 1966.

The Hearing resulted in a finding of guilty to the charge of violating the Florida Statutes pertaining to the practice of dentistry, and the Florida State Board of Dentistry revoked Dr. Roy F. Mack's license to practice dentistry effective April 1, 1966.

In due course, Dr. Mack's Petition to the District Court of Appeals, Third District, State of Florida, for a Writ of Certiorari was denied (*Mack v. Pepper*, 192 So. 2d 66).

The District Court of Appeals, Third District, State of Florida, in its opinion said:

> "In his brief, petitioner has presented two points. *The first point urges that the procedure before the Dental Board was such that he was deprived of a fair and impartial trial. The second point urges that the Board's findings are not supported by substantial competent*

> evidence. We have reviewed the record in the light of *these charges*, and we find that the first point is without merit. See State ex rel. Williams v. Whitman, 116 Fla. 196, 150 So. 136, 156 So. 705, 95 A.L.R. 1416 (1934); Florida Board of Pharmacy v. Levin, Fla. 1966, 192 So. 2d 14 (filed October 12, 1966). The second point is also without merit. *A review of the record reveals evidence to support the finding of the Board* under the rules laid down in De Groot v. Sheffield, Fla. 1957, 95 So.2d 912 and Florida State Board of Dental Examiners v. Feinglass, Fla.App. 1964, 166 So.2d 686."
>
> (Emphasis supplied)

The District Court of Appeals, Third District, State of Florida, then quoted from one of the opinions cited, i.e., Florida Board of Pharmacy v. Levin, supra, in some detail.

A Petition for Rehearing was denied and thereupon Dr. Roy F. Mack petitioned for Writ of Certiorari to the Supreme Court of Florida to review the ruling of the District Court, and this was denied (Mack v. Pepper, 201 So.2d 551). His Petition for Rehearing in the Supreme Court of Florida was denied on June 5, 1967.

Dr. Roy F. Mack did not petition this Court (Supreme Court of the United States) for Writ of Certiorari.

Dr. Mack filed suit in the United States District Court for the Southern District of Florida (approximately six months after the Supreme Court of Florida's denial of his Petition for Rehearing). Dr. Mack relied primarily upon jurisdiction under the Fourteenth Amendment to the Federal Constitution. The United States District Court for the Southern District of Florida *found that the Board applied the appropriate test of evidence* but held that the mixing of functions by the Den-

tal Board constituted a deprivation of due process under the Fourteenth Amendment and ordered a Rehearing.

The Florida State Board of Dentistry appealed the decision of the United States District Court for the Southern District of the State of Florida and presented the question concerning whether or not the findings of the United States District Court for the Southern District of Florida constituted a denial of due process of law and whether the so-called mixing of functions of the Board was improper and a denial of due process of law and contravention of the Fourteenth Amendment.

Dr. Roy F. Mack cross-appealed from the decision of the United States District Court for the Southern District of Florida on the standard of proof required in administrative proceedings, i.e., requiring proof "beyond a reasonable doubt", and that the Court should not have ordered a Rehearing, but merely returned Dr. Mack's license. Counsel for the respective parties briefed the case on these contentions.

Florida State Board of Dentistry appropriately raised the question of jurisdiction of the United States District Court for the Southern District of Florida and the jurisdiction of the United States Court of Appeals for the Fifth Circuit based primarily upon two recent decisions of the United States Court of Appeals for the Fifth Circuit and cited therein opinions of other Circuits of the United States Court of Appeals. Said cases being:

> *Paul v. Dade County, Florida*, 419 F.2d 10 (5 Cir. 1969) and *Brown v. Chastain*, 416 F.2d 1012 (5 Cir. 1969).

In oral argument, the United States Court of Appeals for the Fifth Circuit was primarily interested in argument con-

cerning the question of jurisdiction and argument upon the merits was very limited and no argument, consideration or mention was made at the time of the oral argument concerning the transcript of the Board Hearing and neither was said matter presented to the Court or in any way briefed or argued by the parties.

To the contrary, the pre-trial stipulation entered into by counsel for the respective parties in the United States District Court for the Southern District of Florida stated that the Plaintiff (Dr. Roy F. Mack) received due and proper notice of the holding of said Hearing and was represented by counsel thereat and that Dr. Roy F. Mack was given an opportunity (through his counsel as mentioned above) to cross-examine the witnesses for the Board and to present his own testimony and that of his own witnesses.

This pre-trial stipulation was included in the records in the United States Court of Appeals for the Fifth Circuit on page 254 thereof and was set forth by the Florida State Board of Dentistry (Appellant below) on page 6 of their brief (and appendix of appellant in said Court). Said stipulation* was was also included in the Findings of Fact, Conclusions of Law, and Final Judgment of the United States District Court, Southern District of Florida, contained in both Appendix (Petition of the Board, Appendix 8 and Petition of Mack, Appendix 8).

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*There are two questions to be decided by the Court, although discussed by defendant under four subdivisions. They are: (1) whether the Board, in proceedings to revoke a professional license such as this, is required to use the reasonable doubt test, and (2) whether the mixing of functions outlined in the foregoing resulted in a deprivation of plaintiff's rights to procedural due process. It should be pointed out that the plaintiff does not complain here of a denial of proper notice, or counsel, or the right to confrontation and cross-examination. The scope of this review, insofar as the second question is concerned, is strictly limited to the constitutional propriety of the mixing of functions, as here outlined.

The United States Court of Appeals for the Fifth Circuit in its opinion said

> "This Court has made an independent examination of the transcript, [518 pages] of the purported Hearing given Dr. Mack by the Dental Board on February 18, 1966."

and then proceeded to analyze portions of the transcript which had not been briefed or presented to that Court in any issue.

The issue of a fair and impartial Hearing had been decided in the District Court of Appeals, Third District, State of Florida, however, and Dr. Mack, speaking through his attorney on page 3 of his brief in the United States Court of Appeals for the Fifth Circuit directed to the Appellant (Florida State Board of Dentistry) Motion to Reverse the lower Court solely on the basis of jurisdiction said

> "The Board has attached to its Motion (on jurisdiction) Mack's brief of Petitioner before the Fifth Circuit Court of Appeals. While it is true that the brief raised the contention that the trial before the Board was not 'fair and impartial' under the State and Federal Constitution, a fair reading of the brief shows that the basis of this contention *was the conduct of the hearing* . . . . ." (Emphasis supplied)

Without argument at this point, the Court's attention is invited to the very heart of this matter, that the Trial Court, the United States District Court for the Southern District of Florida lacked jurisdiction; that the United States Court of Appeals for the Fifth Circuit refused to rule on the question of federal jurisdiction. The United States Court of Appeals for the Fifth Circuit compounded the jurisdictional errors of both Courts by assuming appellate jurisdiction over State Courts when this Court (Supreme Court of the United States)

has clearly stated that it does not possess such appellate jurisdiction. *Rooker v. Fidelity TrustC ompany*, 263 U.S. 413 (1923).

ARGUMENT

Basically, the only real question to be presented to this Court (Supreme Court of the United States) is whether the Federal District Court or the Fifth Circuit Court of Appeals had any jurisdiction to act as an appellate review authority over the highest courts of the State of Florida and to review a final determination of a Federal question voluntarily submitted to and decided by the highest Courts of the State of Florida. Incident to this question is the appellate jurisdiction of the Fifth Circuit of Appeals to make an independent examination of the transcript sua sponte (in violation of the stipulation of the parties) and thereby exercise additional appellate jurisdiction over the highest courts of the State of Florida.

1. Arguing in order, however, the questions presented, both the Federal District Court and the Fifth Circuit Court of Appeals stated the correct rules and law that a State Administrative Hearing is not required to use the "beyond a reasonable doubt" standard. The United States District Court, Southern District of Florida stated:

> "With respect to the standard of proof argument raised by plaintiff under the first question, the Court must point out that it is not being asked to determine what standard must be followed in an administrative proceeding such as this, but rather whether the proof must be such as to satisfy the reasonable doubt standard. As the Supreme Court has stated:
>
> 'It is of course within the power of the state to

> regulate procedures under which its laws are carried out, including . . . the burden of persuasion, "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser* v. *Randall*, 357 U.S. 513, 523, 78 S.Ct. 1332, 1341 (1958).'

While as plaintiff points out, there may be an 'interest of transcending value' involved here, the Court cannot say that the reasonable doubt test as applied to non-criminal matters is 'rooted in the traditions and conscience of our people.'

The plaintiff erroneously relies upon the case of *United States* v. *Costanzo*, 395 F.2d 441 (4th Cir. 1968), as authority for his contention that proof before the Board must be beyond a reasonable doubt. That case, extending the reasonable doubt test to federal juvenile proceedings, specifically held that 'a federal juvenile proceeding which may lead to institutional commitment must be regarded as *criminal*.' *United States* v. *Costanzo*, *supra* at 444. [Emphasis supplied.] Accordingly, it is apparent that the Board was not required to use the 'beyond a reasonable doubt' standard."

The Fifth Circuit Court of Appeals stated:

> "First, it held that the Board in proceeding to revoke a professional license was not limited to evidence beyond a reasonable doubt. With this we definitely agree, see 296 F. Supp. at 1262."

The Petitioner (Dr. Mack) in his Petition for Certiorari makes the same argument he made to the Courts below on the question of reasonable doubt proof, which argument is clearly not supported by the cases cited or argument made.